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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BILLY JOE LAFFERTY,
Petitioner,

vs.

CITY OF COOTER, RICK COOPER, STEVE CHILDERS and JUNE KEEN, in Their Official and Individual Capacities as Aldermen,
Respondents,

On Appeal From The
8th Circuit Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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II

QUESTIONS PRESENTED FOR REVIEW

The question for review is the appropriateness of the Federal District Court Magistrate's ruling granting all the respondents a summary judgment. Therefore, the issue becomes, in general terms, "... whether the plaintiff (petitioner) failed to make a showing sufficient to establish the existence of essential elements to his case on which plaintiff (petitioner) has the burden at trial." (Rule 56[C] and the language of the Celotex case cited and relied upon by the said Magistrate. Celotex Corp. vs. Catreet, 477 U.S. 106, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]).

III

Breaking that rule down more specifically and applying it to the case at bar, the issues become whether this petitioner who seeks certiorari could have stated a civil rights cause of action for having been denied a liquor license by this city. This involves the sequence of related issues which were all resolved in favor of the defendants (respondents) by the Magistrate, to-wit: ... First, whether the Ordinance involved is valid (the said Ordinance which was enacted in 1983 is fully set out in petitioner's appendix); ... Second, whether the interpretation of the Ordinance by respondents, as city officials, was a reasonable one, and ... Third, whether the denial of the liquor license was undertaken with

malice by the respondents and whether their action caused a deprivation of a known or established constitutional right (this involves the ultimate issue of whether plaintiff (petitioner), in seeking a liquor license, belongs to a protected class or seeks protection of a fundamental right which the Court below answered in the negative).

Lastly, while respondents state that these were the step-by-step issues decided in their favor below by the Magistrate and the 8th Circuit Court of Appeals, they further state that the resultant issue here in the Supreme Court is whether this case then presents an important issue for determination in this Court. Specifically, whether this Court

should rule on the legality of a Missouri 4th Class City's regulation of liquor licenses.

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STATEMENT OF THE CASE

A. Nature of case and course of proceedings:

Petitioner seeks relief under 42 U.S.C. 1983, claiming a violation of his civil rights when the respondent, City of Cooter, Missouri, a 4th Class City in said State, did not issue him a liquor license to sell beer for consumption on the premises when he failed to comply with the Cooter liquor license Ordinance. The respondents below are the City itself, population 480, the Mayor, (Cooper) and the two Aldermen that voted against the issuance of the license (Childers and Keen).

The respondents moved for summary judgment in the Federal District Court of Missouri (Eastern

District, Southeastern Division) which was sustained by a U.S. Magistrate. Petitioner's appeal of that ruling was initially dismissed by the 8th Circuit Court of Appeals as frivolous. Thereafter, petitioner moved for a rehearing which was considered by the 8th Circuit to be a motion to reconsider the dismissal of the appeal. Rather than actually rule on that motion, petitioner was directed to show cause why the appeal should not be dismissed as frivolous. This Court then reinstated a briefing schedule.

After briefing and oral argument, the 8th Circuit ruled per Curian, summarily and without a printed opinion, in favor of respondent City, Major, and Aldermen. (See petitioner's appendix).

B. Facts:

As will be stated further in the argument section, the requirements of Federal Rule Civ. Pro. 56(C) for sustaining a summary judgment motion have been met here, in that the pleadings, admissions, stipulations, depositions, and affidavits demonstrated no genuine issue of material facts, for the following facts are undisputed: (Respondents deem it necessary to present these undisputed facts to correct omissions by petitioner in his fact statement).

Petitioner Lafferty, at the time he filed for a beer license in Cooter and continuously thereafter, worked a full-time 8 hour day job as a welder/fitter in Blytheville, Arkansas, a town 10 miles travel from

Cooter. The building petitioner sought to occupy for the tavern was owned by his brother, and he was going to rent it if he could get a beer license. He was not going to run the tavern himself, but rather would continue his full-time job in Blytheville and have someone else run same. The brother, Lewis Lafferty, has a package store in the very same building. The said Lewis Lafferty has had his liquor license long before the passage of the 1983 Cooter Ordinance here in question. An Affidavit of Rick Cooper was attached to respondents' motion for summary judgment which indicated that the applications of Lewis Lafferty were treated as "grandfathered" and the Ordinance "provided a mechanism to

monitor the conduct of already licensed liquor businesses," quoting the Magistrate.

Petitioner obtained a liquor license from Mayor Cooper and filled it out. Then, at a Board of Aldermen meeting, the procedure as to processing the license was discussed. First, petitioner was investigated by the Cooter police and Mayor Cooper later reported to the Board that the investigation was complete and that insofar as that investigation was concerned, nothing was found in petitioner's background to disqualify him from having a license. According to the Ordinance, the next step was to determine if petitioner had complied with the rest of the Ordinance by obtaining a petition containing the

signature of 75% of the owners of real property located within a radius of 600 feet of the proposed location. This procedure started at the May 14, 1985, meeting. Thereafter, these Aldermen and the Mayor met with and worked with petitioner and his family throughout a series of meetings in an attempt to give aid to petitioner to comply with the petition-signature provision. The first thing the City assisted petitioner with was to determine the 600 foot radius. The Aldermen drew one circle, but petitioner believed a smaller circle or radius was appropriate and drew a smaller circle inside the City's. The respondent City officials agreed to use petitioner's smaller inside circle, thereby reducing the number of

signatures he would need. Petitioner Lafferty stated in his deposition, as contained in the summary judgment motion, "... we done it as fair as we thought possible for both of us." He further stated in the deposition excerpts cited by respondents in their summary judgment motion, that he never felt that he was being treated unfairly by the City or any of the respondents. The City obtained the help of the City Tax Collector to identify the property owners within the agreed-upon smaller circle and gave these names to the petitioner.

To further help reduce the number of signatures, the respondents had established specific guidelines to use and no deadline was ever imposed upon petitioner to get the petition

submitted. Petitioner's relatives lived within the circle and respondents accepted their signatures, including petitioner's wife.

It was not until July 9, 1985, after two months of attempts by petitioner, his wife and family, to get signatures, that the application was denied at a board meeting. Said denial was for the sole and only reason of lack of signatures. The list of names obtained had been submitted to the board on multiple occasions, with the board even calling special meetings day and night to accommodate petitioner (Cooper deposition indicated a night meeting on June 11th and a noon meeting on June 12). The board, instead of initially denying the application for

lack of signatures, sent the petitioner back for further opportunities to get more signatures and repeated this procedure at meeting after special meeting. After two months, it was apparent to the board that the requisite number of signatures could not be obtained and the petitioner himself urged a decision rather than keep trying.

The final tally indicated that in this town of 480, there were 42 eligible owners in the 600 foot circle to be contacted. Petitioner, therefore, needed 75% of 42 or a figure of 31 names. Petitioner had 22 names on his petition, three of whom were determined by the respondents to actually live in the same home which reduced his petition to 19 names. One

of those was petitioner's wife and another petitioner's brother; however, these were allowed by the Aldermen. It was therefore understood that petitioner did not comply with the Ordinance.

Respondents, in their motion for summary judgment, presented facts about the layout or makeup of their community. It is uncontested fact between the parties that Cooter is very small and has no formal zoning laws. There is no location in the town that would not be within 600 feet of a residence. The proposed location for petitioner's liquor license is in an area, consisting of a few empty buildings, a grocery store, the City Hall, and a gas station. There are several residences mixed in with these

and several residences close nearby, some at the back door of petitioner's proposed location and across the street.

ARGUMENT

Respondents' argument against certiorari will first parallel the Magistrate's decision which granted the respondents' summary judgment. (See petitioner's appendix for the complete opinion granting summary judgment). Respondents will further assert that the logic and reasoning of the Magistrate's decision of summary judgment in their favor also supports respondents' claim in this Court that no important question of Federal law is presented here, nor are there conflicts in Federal cases or jurisdictions over this liquor license issue, and the cities' right to so regulate. The reasoning of the summary judgment in favor of these respondent-defendants

indicates that cities can regulate liquor licenses and, therefore, this case does not present an issue for this Court to settle. The 8th Circuit upheld the Magistrate's ruling of summary judgment in favor of the city and its officials and did so without the need for a printed decision, (see petitioner's appendix for the March 15, 1988, per Curian decision) and without having to cite any authority, as the issue of city liquor license regulation and the power to do so stands without question. If there were conflicting decisions on the same subject, they would have been cited and discussed by the 8th Circuit, or by petitioner, but same was not necessary as no such conflict in the law exists and, therefore, that presents yet

another reason to deny certiorari. Respondents submit that the Magistrate's decision is a logical sequence of reasoning leading to its conclusion that petitioner could not have made a submissible jury case and that, at this stage, summary judgment was appropriate. Respondents noted early on in their argument to the 8th Circuit that the centerpiece of the Magistrate's reasoning was the decision in the Celotex case. (Celotex Corp. vs. Catreet, 477 U.S. 106, 106 S.Ct. 2548, 91 L.Ed.2d 265 [1986]). Celotex, supra, plus the equally recent case of Anderson vs. Liberty Lobby, Inc., 91 L.Ed.2d 202 (1986) together establish the modern standard for cases involving summary judgment, particularly as it applies to granting same in favor of

the respondent when the petitioner has not made, or cannot make, a submissible case. Summary judgment is now viewed not to be a harsh remedy, but one appropriate and expeditious when the facts indicate it is appropriate. A brief summary of the two decisions (Celotex and Liberty Lobby) would say that the new standard of review provides that the mere existence of some alleged factual disputes will not defeat a properly supported motion for summary judgment, i.e., the emphasis is on the requirement that there be no genuine issue of material fact (emphasis from Liberty Lobby), and that after discovery, a summary judgment will be sustained against a party who fails to make a showing sufficient to establish

the existence of essential elements to his case over which he has the burden (Celotex). A failure of proof by a plaintiff over issues, as in the case at bar, like the existence of malice or arbitrariness renders all other facts immaterial and subjects a plaintiff to dismissal by summary judgment, just as a verdict would have been directed in favor of respondents had the case gone to trial. (A "mirror" standard between summary judgment and Rule 50(A), directed verdicts [Liberty Lobby]).

The Magistrate took the standards established by Celotex and Liberty Lobby, supra, to determine that there were no material factual disputes between Lafferty and the City of Cooter and that the question was

one of law. He further determined that petitioner could not sustain his burden as a matter of law to prove arbitrariness here (the "essential element," Celotex, supra) on the part of these defendants. That made summary judgment, at that stage, appropriate just as a directed verdict for these respondents would have been at trial. The cross-motions for summary judgment filed by this petitioner and respondents in the District Court relied upon and set out a large segment of the depositions, admissions and discovery of these parties. This gave the Magistrate the crux of the testimony of all parties, petitioner and respondents. The Magistrate then was saying that based upon the evidence and extensive

testimony presented in the motions, he would have directed a verdict in favor of these respondents. The Magistrate decided upon the whole record before him, as brought to him by the vehicle of motions for summary judgment, that there was no need for a trial (the language of Liberty Lobby, supra), albeit that there were no genuine factual issues that properly could be decided only by a finder of fact. To get to that conclusion, it was necessary to pull out and determine the undisputed facts. These briefly were: That the only reason petitioner was denied a beer license was petitioner's inability to obtain the necessary number of signatures on a petition as required by the ordinance; that Cooter had no zoning, nor did the

Magistrate or the 8th Circuit find that Cooter was required by Missouri law to have zoning; that there was no location in Cooter that was not within 600 feet of a residence; that while the proposed location for the license is within what could be stretched to be called a "business" area of Cooter, it is not exclusively commercial or business, as there are residences nearby and, in fact, practically existing at the back door of some businesses and right across the street; that the respondent city, mayor, and aldermen had worked with and cooperated with petitioner in regard to the petition and signature process; that petitioner claimed no ill will, no unfair treatment, and no impermissible motives by or from these

respondent city officials as they worked with him, and his family, for over two months to determine if petitioner could get the requisite number of signatures.

The case then was appearing quickly, by reason of these uncontested facts, to be appropriate for summary judgment. These facts were physical facts such as the actual locations of residences and businesses. The further facts involved were a matter of public record as contained in the minutes of the Board of Aldermens' meeting and in the actual petition itself with its lack of signatures as submitted by petitioner. No dispute on these facts did or could arise. Therefore, the Magistrate properly found that each side was

agreeing the only issue as to respondents' liability is one of construction of the ordinance, an issue of law rather than fact. Northern Natural Gas Company vs. O'Mally, 277 F.2d 128 (8th Cir. 1960); League to Save Lake Tahoe vs. Capitol Enterprise, 685 F.2d 1142, 1144 (9th Cir. 1982); Standard Oil Company vs. Department of Energy, 596 F.2d 1029, 1066 (Temporary Emergency Court of Appeals, 1978).

Turning then to the ordinance itself, it is clear that the Magistrate found that a fourth class city such as Cooter does not have to have zoning. Ch. 89 RSMo. is clearly permissive. (See petitioner's appendix). Therefore, plaintiff cannot validly claim that Cooter, by

its liquor ordinance, is zoning without following the requirements of Ch. 89 RSMo. The purpose of the disputed ordinance is also clear. It is a liquor license ordinance. It only speaks about liquor and licenses. Most of the cited cases deal with other types of facts, not liquor licenses. Its sole purpose is to set procedures and requirements for the issuance of liquor licenses. The crux of respondents' argument to deny petitioner's certiorari is that cities do have the authority to so regulate that particular activity, citing as did the Magistrate, State ex rel. Payton vs. City of Riverside, 640 S.W.2d 137, 140 (Mo.App. 1982), thus, making this a case that is not calling out for new determinations in the U.S.

Supreme Court. Applying the actual facts, i.e. the small size of Cooter and the actual mixture of residences and businesses, as shown by the attachments and exhibits to the motions for summary judgment, it was reasonable and obvious to see that zoning in Cooter, with its small population of 480 people, covering a small area, would be impossible, impractical and unworkable. Therefore, the only purpose of the Board was regulating intoxicating liquors which is within their delegated authority, and as the Magistrate quoted, same is not to be disturbed if susceptible of reasonable construction. (Payton, supra). The Magistrate indicates that a reasonable construction, based upon these actual

physical, undisputed facts, as presented in the motions, is that Cooter meant to require the signature procedure that they set forth clearly in the ordinance for any location in Cooter. That was Mayor Cooper's interpretation as contained in his deposition. That was respondent Keen's reasonable interpretation when she succinctly summed it up by saying "... We're not zoned, our community is so small that we are not zoned as residential or commercial or business." (Keen's deposition). These opinions were given importance by the Magistrate, for "The interpretation of an ordinance by the body in charge of its enactment and application is entitled to great weight." Coots vs. J.A. Tobin

Construction Co., 634 S.W.2d 249 (Mo. 1982). State, ex rel. Lack vs. Melton, 692 S.W.2d 302, 304 (Mo. 1985); State ex rel. Lebeau vs. Kelly, 697 S.W.2d 312 (Mo. App. 1985). The interpretation must be given in light, therefore, of the legislative objective which was obvious here to regular liquor licenses. Collins vs. Director of Revenue, 691 S.W.2d 246, 251(Mo. 1985). The depositions are full of references by these respondents expressing their reservation and fear of having the problems again in towns which can come from the existence of too many taverns. Years ago, there had been a liquor establishment at this very location and there had been numerous problems. This is a legitimate concern of a law

making body according to the Magistrate. It demonstrates their conscientious feeling for their town and not any impermissible or malicious attitude. More importantly here, that concern clearly proves that what was being sought to do here was to regulate and set forth a procedure for liquor licenses, not to carve up the town or start making distinctions between businesses and residential districts when there had never been any before because of the intermixture of businesses and residences. This was petitioner's first line of attack, but the obvious facts and purposes and concerns expressed by the respondents mitigated against petitioner's interpretation.

Petitioner has also attacked the consent requirement itself which the 8th Circuit found by their summary decision to be permissible as a way to regulate this particular type of license and activity. Respondents assert that the cases cited by petitioner to the 8th Circuit failed to provide a basis to invalidate the Cooter Ordinance and/are significantly distinguishable from the Cooter case. Larkin vs. Grendels Den, Inc., 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505 (1982) involved a Massachusetts State Statute, applying a state law, not a local city ordinance which allowed one very narrow specialized group (school and churches) to have a direct veto power over a liquor license if the liquor premises were

located within 500 feet of the church or school. Plaintiff, in the Larkin case, did not assert a civil rights violation and the statute was struck down as being invalid upon the narrow grounds and rationale that the said statute was advancing religion and, therefore, violated the separation of church and state. This case is radically distinguishable on its facts from the Cooter experience. In particular, under the Cooter Ordinance, no one person or institution could veto a liquor license, nor does any violation take place in regard to a specialized group. Justice Rehnquist, dissenting in Larkin, supra, believes the emphasis on religious advancement and the establishment clause was "silly," but

he cites some general authority favorable, by analogy, to the respondents in our case at bar as follows: (l.c. 308 (L.Ed.). "The majority concedes, as I believe it must, that an absolute legislative bar on liquor outlets within reasonable prescribed distances from churches, schools, hospitals and like institutions would be valid." California vs. LaRue, 409 U.S. 109, 120, 34 L.Ed. 342, 93 S.Ct. 390 (1972).

Therefore, even the majority in the Larkin case indicates that there can exist legislative restraints on liquor outlets by way of "prescribed distances." That reasoning is found and further pronounced by the District Court Magistrate in citing the

Missouri Payton case, supra, when he sustained the respondents' motions for summary judgment. The state can certainly so regulate liquor to protect churches just as fourth class cities, smaller cities by definition, can protect its citizens, all in a legislative community concern for this particular area, to-wit, liquor licenses.

The State of Washington ex rel. Seattle Title Trust Company vs. Roberge, 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928) cited by petitioner has no application. It was not a civil rights case in any respect, but rather was a challenge in state court against the city building superintendent; it involved the construction of a home for the aged, not the issuance of a

license or liquor license (respondents again in this court, as they did below, urge that liquor license cases involve a specialized separate law of significance and application all their own); it was a case where a comprehensive zoning law did exist as part of the zoning plan of a large metropolitan area, Seattle, Washington, even in 1928; the zoning ordinance in Seattle Title contained numerous other restrictions for different enumerated uses of land, i.e.,signatures of 50% of owners within 200 feet of a proposed stable or building containing domestic animals and two-thirds of owners were required to sign within 400 feet of a home for children,which were not addressed or ruled on. Petitioner

next cited two old cases, one decided in 1893 and one in 1915 (Hayes vs. Poplar Bluff, 173 S.W. 678 (Mo. 1915); St. Louis vs. Russell, 22 S.W. 470 (Mo. 1893), that involved challenges to building permits filed in state courts, thereby affecting different purposes, i.e., that of actual land use. Our case, on the other hand, was properly found to not be a regulation of a land use, but was obviously and specifically a liquor license ordinance with the regulating of liquor its sole concern.

When the Missouri courts have looked at these type of ordinances specifically applying to liquor licenses, such as State ex rel. Hewlett vs. Womach, 196 S.W.2d 809, en banc (Mo. 1946), they have held

that the cities can additionally regulate liquor licenses with ordinances that contain stricter requirements than the general enabling State Liquor Control Act, if same "preserved the public peace, good order and security against changes arising from the traffic in such liquors."(Womach l.c. 815). The Womach court emphasized that liquor regulation is a special field of law, subject to more regulation, of necessity, by its very nature. Petitioner cites no liquor case in any jurisdiction holding that it is invalid to require a percentage of nearby owners to consent before a liquor license is issued. The Womach case held that the ordinance, involving a 75% signature petition of

owners within 600 feet (exactly the Cooter Ordinance), was not invalid but with no need to discuss any constitutional questions. At this point, with that 1946 ruling as cited in Womach, it is necessary to again cite the 1982 case of Payton, supra, which indicates that in Missouri there is clearly no inherent right to engage in the liquor business. Therefore, since there is no constitutional right to have a liquor license, the defendants-respondents could not have possibly violated Lafferty's rights by denying the license, and thus have the protection of their qualified immunity. That further made summary judgment appropriate, and makes certiorari inappropriate, as this is not an issue

for constitutional review and importance, nor do conflicting decisions exist. This is again emphasizing the special consideration and different treatment given by the leglislatures and courts to liquor licensing, thereby again rendering the cases cited by petitioner involving building permits and land use or anything not involving liquor inappropriate and not in point. Because there is no inherent or fundamental right here, the District Court Magistrate found petitioner was not in a protected class and it has always been the law in that regard that "Before anyone may inject a constitutional issue in a case, his constitutional rights must be directly affected." Citizens Mutual Fire and

Lighting Insurance Society vs. Schoen, 93 S.W.2d 669 (Mo. 1936). Thus, with no case holding the Cooter type of ordinance invalid and with Missouri not recognizing a fundamental constitutional right to hold a liquor license, the Magistrate was correct in granting summary judgment in favor of these respondents. This same reasoning would support respondents' position that this case is not one for the granting of certiorari. (Supreme Court Rule 17).

Since the Womach case cited by plaintiff contained the identical language of the Cooter Ordinance and same was not held to be invalid, these defendants have shepardized Womach and find the following history of reasoning of interest and present it to the court.

Since the enactment of the liquor control laws in Missouri, the more modern decisions have developed a precise set of rules and guidelines in regard to the judicial scope of review of city ordinances that deal with all aspects of liquor licenses, including their issuance (which is our specific concern here). These would be cited in reference to petitioner's quote from Justice Brandeis back in 1891, which reasoning has not been followed by the Courts in allowing liquor license regulations.

We start out with a "legal presumption of validity which attends a municipal ordinance." Passley vs. Johnson, 304 S.W.2d 903 (Mo. 1957). Further, in regard to an ordinance that enlarges upon the requirements of the state statutes,

"As a general rule, an ordinance which supplements a state law and enlarges upon the requirements of the statute, creates no conflict unless the statute limits the requirements for all cases to its own prescriptions. Vest vs. Kansas City, 194 S.W.2d 38 (Mo. 1946). And although the ordinance may enlarge upon the provisions of a statute by requiring more than the statute requires, it may not prohibit what the statute permits or permit what the statute prohibits." Womach, supra, Nichols vs. North Kansas City, 214 S.W.2d 710 (Mo. 1948).

Taking this scope then a step further and bringing it up to the present state of the law,

> "The trial court in reviewing the court's decision is not the trier of fact. ...It reviews the propriety of the legislative decision, and if that decision is fairly debatable and is supported by substantial evidence of reasonableness and necessity, the legislative decision must be upheld - it may only be overturned if found to be arbitrary, unreasonable and clearly erroneous." J.C. Nichols Company vs. City of Kansas City, 639 S.W.2d 886 (Mo.App. 1982); Payton, supra.

Specifically, in regard to fixing standards before the issuance of a license, Cooter can additionally cite State ex rel. Kimberling vs. Peterson, 214 S.W.2d 739 (Mo. 1948), as authority: "Cities may fix standards

to be met before (our emphasis) issuing a liquor license," and consistent with the authority above, "... only requirement being that the ordinance must not conflict with the statute." (l.c. 741). State ex rel. Copper Kettle Restaurants, Inc. vs. City of St. Robert, 424 S.W.2d 73 (Mo. App. 1968). (Restricted actual number of licenses to issue in the town).

These grounds provide support for the Magistrate's decision granting these respondents a summary judgment, and they lead us to the last step in the Magistrate's reasoning and decision, which was then upheld by the 8th Circuit. Up to this point, using Celotex, and the principles above, he had found the interpretation of the ordinance to be reasonable. There

were no historical reasons or physical facts in evidence by the motions for summary judgment that indicated Cooter could be divided into separate residential or business districts. These facts and the clear objective of the ordinance to regulate liquor licenses allowed him to quickly dismiss the petitioner's theory of construction under "expressio unius." Bailey vs. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 500 (8th Cir.) (1986). The reasonable interpretation was that everyone applying for a liquor license had to comply with the consent requirement of obtaining 75% of the landowners' signatures that lived within 600 feet of the proposed location. Metro Auto Auction vs.

Director of Revenue, 707 S.W.2d 397 (Mo. 1986); Collins, supra. In using the historical and physical evidence provided to him by respondents in the motions for summary judgment, the Magistrate had adhered to the primary rule of construction which, in these type of cases, is that, "to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and the manifest purpose of the statute, considered historically (our emphasis) is properly given consideration." Citing City of Flat River vs. Mackley, 212 S.W.2d 462 (Mo. 1968); 2 Lewis, Sutherland on Statutory Construction, 2d Edition, Section 363; Endlich on

Interpretation of Statutes, Section 329 and Maxwell on Statutes (5th Edition), 425. The Mackley case involved the construction of an ordinance which involved the sale of intoxicating beverages. That case also, back in 1948, followed the general rules above that a municipality is not prohibited from exacting additional requirements so long as there is no conflict between the ordinance and the state statute. In addition to citing the Vest case, supra, the Mackley case gave attention to 43 corpus juris, Municipal Corporation, Section 220(B). The Magistrate had additionally found that the City had the power to so regulate and that their enlargement of requirements before licensing was not

in violation of the State Liquor Control Law. The Magistrate had further correctly seen that petitioner had no fundamental right under Missouri law to have a liquor license and was, therefore, found not to be in a protected class. This brought him to the last step in his analysis which was to determine if the denial of the license was undertaken by these defendants with malice or with some type of impermissible motive which caused a depravation of a constitutional right.

In reaching the conclusion in reference to the absence of malice, respondents first point to our District Judge Wangelin's decision in this case when he allowed their immunity defense to stand after their

answer was filed dated October 18, 1985. He indicated the standard to be followed:

> "The court finds and defendants agree that they are protected by the qualified immunity. Accordingly, the defendants herein are liable only if one, they knew or reasonably should have known that their actions violated plaintiff's clearly established rights, or two, they took the action with malicious or impermissible motives causing a depravation of constitutional rights to plaintiff." Chase vs. McMasters, 573 F.2d 1011, 1019 (8th Cir. 1978); Burns vs. City of DesPeres, 534 F.2d 103 (8th Cir. 1978); Monell vs. Department of Social Services of City of New York, 436 U.S. 658 1978; Herrera vs. Valentine, 653 F.2d 1221 (8th Cir. 1981).
>
> Defendants' defense of a qualified immunity is a viable argument and may prove to be meritorious as discovery in this matter continues. Consequently, defendants' qualified immunity defense will not be stricken.

Respondents add to the Chase case, supra, the authority contained in Burns vs. City of DesPeres, 534 F.2d 103 (8th Cir. 1978); Monell vs. Department of Social Services of City of New York, 436 U.S. 658 1978; Herrera vs. Valentine, 653 F.2d 1221 (8th Cir. 1981).

It was after the discovery, which was extensive, that the motions for summary judgment were filed by these defendants which detailed the evidence and testimony. The Magistrate quoted from those deposition experts and found that petitioner himself conceded there were no ill feelings involved, and that respondent officials had fairly given him ample opportunity and time to obtain the signatures required. Quoting from Mayor (and respondent) Cooper's deposition:

> "Q. Do you know what the reason for amending that ordinance was?
>
> A. To be able to control the license to the point that -- we had a very bad problem with dope, and the element that was in town, we had had several burglaries, and the townspeople were very upset because we could not do anything about some of the problems going on, we had trouble regulating the times which they opened and closed, they would not abide by any ordinances that we had, and because of the concern of the people, one of which was Mr. Lafferty's brother that voiced the biggest concern, we need to do something about the pool hall, and we amended our laws, because we felt our laws were not adequate."

This doesn't sound like a malicious Alderman. It is a conscientious and concerned one not found by the Magistrate or the 8th Circuit to be acting by an impermissible motive. 2 C. Sands and M. Libonati Local

Government Law, Section 11.10 (1981). These respondent officials all stated that when it came down to voting on the petitioner's application, the only reason they voted no was because of the failure of petitioner to get the requisite signatures - a strict compliance with the ordinance. They felt they had to vote no or the ordinance would have no meaning.

Giving Lafferty the benefit of all reasonable inferences, the Magistrate found no showing by petitioner that respondents acted maliciously, it was determined that petitioner presented no set of facts possible which would entitle petitioner to relief. Celotex, supra.

Further, there was found to be no dissimilar treatment in the

approval of the petitioner's relative (the one mentioned in Mayor Cooper's quote above), in regard to his package license next door. That license existed long before the ordinance was passed and was treated as being "grandfathered in." The Cooter Ordinance itself also provided a mechanism to monitor the conduct of already licensed liquor businesses within the community. The sections of the Cooter Ordinance were found to balance and compliment each other in regard to covering the field for licenses in existence and those being sought after the passage of same.

In summary and conclusion, the respondents urge this court to uphold the Magistrate's decision in the District Court granting them summary

judgment by here denying certiorari to the petitioner. The facts in this case and the authorities cited applicable to those facts indicate that the petitioner could not have made a submissible case under any favorable inference. The entire case in the way of deposition excerpts, testimony, affidavits, maps, pleadings, and the like, all were in front of the Magistrate and, upon reviewing same, he decided in light of Celotex and Liberty Lobby, supra, that summary judgment was appropriate. The essential elements of petitioner's case, particularly those surrounding the alleged malice of these respondent city officials, had been nonexistent and could not be proven for purposes of submitting the matter to a jury.

It was clear to the 8th Circuit panel that the respondents in their legislative function were sincere Aldermen and protectors of the rights and liberties of the people which they represented. The adverse party, petitioner, admits the conscientiousness and fairplay exhibited. The ordinance has a rational basis in the history of the community and the Magistrate was correct in pinpointing that a reasonable interpretation obviously meant by these respondents was that anyone coming before the Board of Aldermen in the community of Cooter, Missouri, would simply have to present a petition giving the consent of 75% of those persons within 600 feet of the proposed location. There is no

Missouri case which strikes down that consent requirement, as Missouri pays particular and close attention to the right of the cities to regulate liquor licenses in particular. That reasonable interpretation, when made in light of the history and physical facts here presented, was not vague to anyone. There is no "fundamental right to engage in the liquor business" involved here, which is further cited by respondents for the proposition that petitioner cannot raise this case to a necessary level for a decision in this Court, (the Payton, supra, was cited by the Magistrate as the clear law in Missouri).

Stated simply, this is not a case for review for this Court and

certiorari should be denied. The Magistrate's decision and the 8th Circuit's affirming of same does not need review, as cities can regulate liquor licenses in Missouri without question. Thus, no important question or set of facts for national attention is presented, nor is that determination in conflict with other decisions. (S.Ct. Rule 17).

Respectfully submitted,

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